No. 3844

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

In the Matter of C. F. MASON and WM. McD. OWEN, co-partners, trading as MASON & OWEN,

Bankrupts,

C. F. MASON and WM. McD. OWEN,

Bankrupts,

GEORGE P. KIER, Trustee,

Appellant,

vs.

J. E. STEER,

Appellee.

# Appellant's Brief

Upon Appeal from the United States District Court for the Southern District of California, Southern Division

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### STATEMENT OF THE CASE.

This is an appeal from an order entered in the matter of Mason & Owen, Bankrupts. The appellee, Steer, sought to recover from the Trustee of the Bankrupts 100 shares of Midvale Steel stock which had been purchased by Mason & Owen, stock brokers, and which were in the possession of Logan & Bryan in New York City, who were holding same until the dispute between Steer and the Trustee should be determined, Logan &

Bryan making no claim to the stock at the time this proceeding was begun.

The lower court held that the stock should be delivered to Steer and it was so ordered. (Record 22.)

The record in this case was prepared pursuant to stipulation (Record 2) which stipulation contains the stipulation upon which the case was submitted to the lower court, together with additional evidence hereinafter referred to.

## ESSENTIAL FACTS.

The essential facts are that Mason & Owen were, in the spring of 1920, engaged in business in San Diego as stockbrokers and on February 27, 1920, Steer deposited with them, as his brokers, $150, and later directed them to buy 100 shares of Midvale Steel stock.

On March 20, 1920, Mason & Owen requested Logan & Bryan, members of the N. Y. Stock Exchange, and who were the agents of Mason & Owen, to purchase 100 shares of Midvale upon the credit and account of Mason & Owen, which Logan & Bryan did forthwith, taking the stock certificate in the name of Logan & Bryan, or to their order. (Record 3.)

The purchase price of the stock, $4,775.00, was advanced *in toto* by Logan & Bryan as a *loan to Mason & Owen,* and was charged to their account, together with Logan & Bryan's commission of $15.00 for making the purchase. (Record 10.) That said certificate for 100 shares of Midvale Steel stock ever since March 20, 1920, remained in the hands, and subject to the order of Logan & Bryan, and was retained by them under an agreement between Mason & Owen and Logan & Bryan, as *security for moneys advanced by said Logan & Bryan*

to pay for purchase of stocks for said Mason & Owen (*including the purchase of said Midvale Steel stock*), and as security for the payment of *all* sums Mason & Owen might owe Logan & Bryan upon said date or *subsequent* to that time. That said Logan & Bryan, at no time prior to making loans on said stock, had any knowledge or notice of the claims of said Steer to the 100 shares of Midvale Steel stock, and at all times acted in good faith; and said Steer had no notice of and gave no consent for, the pledging of his said stock by Mason & Owen with Logan & Bryan, other than allowing them to hold said stock, as herein stated.

On March 20, 1920, Mason & Owen falsely represented to Steer that they had executed his order for the purchase of the stock and Steer thereupon paid them $4,647.50, taking their receipt for full payment, and he has ever since claimed to own the stock without any lien against it of any kind, except that he knew that the stock had not been issued in his name (Record 5) and he permitted the stock to remain in the hands of Mason & Owens' brokers, Logan & Bryan, (Record 4) he being ignorant of the pledge.

Mason & Owen *never applied any of Steer's money to the purchase price of the Midvale stock,* but all remittances made by them, if there were any, were applied by Logan & Bryan upon Mason & Owens' general indebtedness. (Record 11 and 12.)

At the time the Midvale stock was purchased Mason & Owen were indebted to Logan & Bryan in large sums of money, repayment of which was secured by pledging to Logan & Bryan the 100 shares of Midvale. That said indebtedness continued and increased until the filing of

the petition in bankruptcy in December, 1920, at which time the indebtedness amounted to approximately $300,-000.00, secured by stocks of the value of $400,000 belonging to the customers of Mason & Owen, including the Midvale stock. (Record 5.)

The effect of the purchase of the Midvale stock was to *increase the burden of the loan* against these customers' stocks by $4,775.00. (Record 10.)

Mason & Owen were Steer's agents and *failed in their duty to apply Steer's money to the purchase price of the Midvale stock,* and Steer now claims that he should not suffer because of the malfeasance of his agents, but that the loss caused to him by their acts should be charged against the *other* customers of Mason & Owen, and that the *entire* indebtedness due to Logan & Bryan should be paid out of the proceeds of the stocks belonging to the *other* customers of Mason & Owen, thus releasing Steer's stock from the lien of the general pledge to Logan & Bryan.

That subsequent to the filing of the Petition in Bankruptcy, the entire indebtedness due Logan & Bryan was paid out of the proceeds of the sale of stocks pledged with them, but that said 100 shares of Midvale Steel stock remained unsold in their hands after payment of all claims of Logan & Bryan against Mason & Owen.

The securities held by Logan & Bryan consisted partly of stocks purchased on margin and partly of stocks paid for in full to Mason & Owen. The proceeds of the securities held on margin were more than sufficient to pay the Logan & Bryan indebtedness in full and were the only ones sold by Logan & Bryan to liquidate their claim. That 21 securities were not sold and survived the liqui-

dation, including 100 Midvale claimed by Steer, and prior to December 1, 1920, all said 21 securities had been fully paid for to Mason & Owen.

Mason & Owen used for their private speculations about $55,000 of the monies deposited with them by their customers so that their assets were to that amount insufficient to pay off the Logan & Bryan indebtedness. (Record 14.)

### NET RESULT OF SELLING THE PLEDGED STOCKS.

The net result of the sale of the securities held by Logan & Bryan was that the stocks of the other customers of Mason & Owen were sacrificed to pay off the *entire* indebtedness due to Logan & Bryan, including that part of the indebtedness ($4,775.00) *caused by the purchase of the Midvale stock,* thus releasing the stock claimed by Steer, and Steer now claims the right to receive his stock *without paying any portion of the Logan & Bryan indebtedness.*

### SPECIFICATION OF ERRORS.

Appellant assigns as error that the court directed the delivery of said stock to Steer unconditionally and directed the payment of dividends to Steer.

### CONTENTIONS OF APPELLANT.

The contentions of appellant which will be discussed in their order, are as follows:

(a) That Steer is estopped to demand his stock unconditionally because he permitted same to be issued in the name of another person, and money was loaned on it in good faith and he is bound by the acts of his agents whom he clothed with the *indicia* of ownership.

(b) That Steer's order to his agents, Mason & Owen, was to make an outright purchase of the stock; that Mason & Owen failed to purchase the stock outright, as directed by Steer, but purchased it as a *marginal* purchase with monies advanced by Logan & Bryan; that such a purchase was not an execution of Steer's order and *Steer was not bound thereby unless he ratified the purchase and claimed the benefit of the transaction,* in which event he must take the stock *as he finds it, i. e.,* subject to the conditions of the purchase as actually made, *i. e.,* subject to Logan & Bryan's advances to Mason & Owen.

(c) That the Steer purchase increased the burden of the Logan & Bryan loan against the stocks of the *other* customers of Mason & Owen which were held by Logan & Bryan, and that Steer cannot now reclaim his stock without assuming this increased burden for which he, through his own agents, Mason & Owen, was responsible.

(d) Even if it should be held that Steer is not to be held responsible for this increased burden of $4,-775.00 placed by his agents upon the stocks of other customers, he should at least be required to contribute his pro rata share of the $300,000 indebtedness and not be permitted to shift his proportion of the losses caused by Mason & Owen to the shoulders of Mason & Owen's other customers. His losses under this last mentioned theory would be such proportion of $300,000 as the value of his stock bore to the value of all the stock in the pledge, or $3,600.00 for which he could file his claim against the estate and receive dividends thereon the same as the other creditors.

I.

## STEER IS ESTOPPED TO DISPUTE THE LIEN AGAINST HIS STOCK.

Steer permitted, without objection of any kind, this stock to be taken in the name of a third person and to remain in the possession of a third party and clothed such party with all the *indicia* of ownership. By means of this apparent ownership, loans were charged against the stock, and such loans were not only charged against this particular 100 shares of Midvale, but the *increase* of debt to Logan & Bryan, which was made possible by the presence of the 100 shares of Midvale in the Logan & Bryan pledge, became a charge against all the *other* stock which was in the pledge.

In other words, the 100 shares of Midvale was solely responsible, for the *increase* of the indebtedness to the extent of $4,775.00.

The question then is, who is to be held responsible for this *increased* indebtedness? Some one must suffer for the act of Mason & Owen in placing this additional charge of $4,775.00 upon the stocks held in the Logan & Bryan pledge.

If Steer, on the one hand, and the other customers of Mason & Owen, on the other, are equally innocent of creating this additional charge, then we invoke the principle laid down in the syllabus to *Nat'l. etc.* vs. *Hibbs*, 229 U. S., 391, which reads:

> "Where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."

Steer is the person whose act enabled Mason & Owen to create this added charge of $4,775.00 and he should

take his stock subject to the indebtedness incurred in its purchase. The charge was incurred *solely for Steer's benefit* and upon what principle can he demand that the *other* customers of Mason & Owen shall pay Logan & Bryan for his stock?

> "The owner of personal property may by clothing another with an apparent title to, or authority over it, estop himself to deny such title or authority."
>
> 21 C. J., 1176.

In *Penn. Ry. Appeal,* 86 Penn., 80 (84), Judge Sharswood said: "Where one of the two parties who are equally innocent of actual fraud must lose, it is the suggestion of common sense, as well as equity, that the one whose misplaced confidence in an agent or attorney has been the cause of the loss shall not throw it on the other."

The above remark by Judge Sharswood was made in a case where stock, duly endorsed, had been intrusted to an agent who wrongfully used it for his own purposes.

Steer permitted this stock to remain in the hands of Logan & Bryan without demanding possession from any one.

If an owner allows his broker who purchases stock for him to hold the certificates in such manner that they will pass by delivery on the endorsement of the broker, he is estopped to claim title as against one who dealt with the broker in reliance upon the broker's apparent title.

*Thompson* vs. *Toland,* 48 Cal., 99.

In the syllabus to *MacDermott* vs. *Hayes,* 175 Cal., 95 (110-11), it is said:

> "One who places his money in the possession and control of another, who thereupon uses it in the purchase of corporate bonds with a stock bonus, and thus becomes enabled to take the stock in his own name * * * is estopped to claim title to the stock as against a purchaser for value and in good faith."

Jones on Collateral Securities, Sec. 466 (p. 552) and cases cited.

Steer's case falls clearly within the principles of the above decisions. He permitted his stock to remain in third parties' name and possession for eight months, clothing them with the *indicia* of ownership. It was *his* act that made the loss of $4,775.00 possible and he should bear the burden.

The foregoing decisions hold that if a party endorses stock to an agent who wrongfully pledges it, the owner must pay the loan. *A fortiori* should Steer stand the loan against his stock because he not only is responsible for having his stock pledged for Mason & Owen's indebtedness, but that indebtedness was created in part for Steer's benefit in the *actual acquisition of his interest in the stock.*

We deny that there is any principle of equity which requires third parties, such as the other customers of Mason & Owen, to submit to a sale of *their* stock to pay off the indebtedness created by the act of Steer in allowing Mason & Owen to borrow money on his stock.

In *Hirsch* vs. *Norton,* 17 N. E., 612 (Ind.), a person transferred stock to another who borrowed money on it; it was agreed between the parties that the assignor should remain the owner and receive the dividends, yet the assignor was held liable for the loan.

In *Russell* vs. *Telephone Co.,* 62 N. E., 751 (Mass.),

the owner of stock endorsed it and entrusted it to an agent who pledged it and the owner was held estopped to deny the lien of the pledge. This was the same principle in *Nat'l. etc.* vs. *Hibbs,* 229 U. S., 391, *supra.*

II.

### STEER IS A MARGINAL TRADER BECAUSE THE PURCHASE WHICH HE RATIFIED WAS A MARGINAL PURCHASE.

Steer's authority to Mason & Owen was to purchase 100 shares of Midvale for him *for cash.* Mason & Owen did not execute *that* order but purchased a similar amount of stock as a marginal purchase *for themselves.* A marginal purchase differs in so many respects from and outright purchase that it was not an execution of Steer's order at all, and Steer was not bound thereby and could, if he so desired, have revoked his order to purchase and demanded the return of his money.

Steer could have recovered from Mason & Owen the money he paid them *at any time before Mason & Owen filled his order* and actually received the stock under their control.

> *Re Brown & Co.,* 189 Fed., 440;
> *Re Wettengel,* 238 Fed., 798, (C. C. A., 3rd) (See page 800).

*Mason & Owen never obtained possession or control of the Midvale stock.* Logan & Bryan always had the full and unassailable possessory right thereto under the contract of pledge, and *the circumstances never arose under which Mason & Owen had the right to appropriate Steer's money to any purpose,* and Steer could have reclaimed it if held intact; if not held intact the case

would be one of embezzlement, but the other customers of Mason & Owen cannot be held responsible to Steer for money embezzled by his, Steer's, own agents.

It is well settled that a pledgee can demand payment of the *entire* indebtedness secured by the pledge before releasing *any* of the pledged securities in his possession.

> Jones on Coll. Securities, p. 64;
> *Goepper & Co.* vs. *Phoenix Brewing Co.*, 74 S. W., 726 (Ky.);
> *Aetna Ins. Co.* vs. *Bank of Wilcox*, 67 N. W., 449, (Neb.), 31 Cyc., 853-4.

As long as Logan & Bryan had the possessory right to the Midvale stock Mason & Owen had not complied with the condition which would authorize them to appropriate Steer's money, and until they had that right Steer could have demanded the return of his money.

Therefore, one of two things must be true,—either that Steer's money remains intact among the Mason & Owen assets, or that Mason & Owen misappropriated the money. In either event Steer is debarred from calling on the owners of the securities found in the Logan & Bryan pledge to refund to him the money that he entrusted to the agents selected by him to handle his affairs.

Of course, if Steer did, as we claim, *ratify* the marginal purchase, then another principle supervenes, viz., adoption of the agents' contract, which is hereinafter discussed.

If Mason & Owen had executed Steer's order as given by Steer, he (Steer) could have secured immediate possession of his stock. Such right of possession was a very valuable right.

The purchase of the stock as *actually* made did not give or preserve the right to possession of the stock except upon condition that the purchaser should pay to Logan & Bryan the indebtedness due from Mason & Owen to Logan & Bryan, for which indebtedness Steer's stock, as well as the stocks of other customers of Mason & Owen, was pledged.

When Steer ascertained the manner in which his order had been executed and learned that the execution had departed from his instructions so materially that he was not bound to take the stock, he was faced with the question whether to refuse to be bound by his agent's *unauthorized* execution of the authority given them, or to *ratify the purchase as made,* accepting the burdens as well as the benefits of the transaction.

He decided to claim the benefits of the purchase and not to seek the return of his money. He had a right to do that, however, but only by accepting the *burdens* as well as the *benefits* of the transaction.

In 9 Ency. of U. S. Decisions, page 701, the rule is laid down that a ratification of an agent's act is equivalent to an original authority *and must cover all the details of the transaction.*

In *Wahl* vs. *Tracy,* 121 N. W., 660 (662) (Wis.), the Court discusses the distinction between the execution of an order to purchase stock *outright* and a purchase of stock as a *marginal transaction,* and holds that a purchase of stock made in the manner followed in the case at bar *was not an execution of an order to buy stock outright* and that the customer (in the absence of a ratification of the purchase) was not obliged to take the stock purchased but could demand the return of his

money,—the theory being that a purchase on margin which left the stock subject to the perils and burdens of a broker's debts *was not an execution of the authority to buy for cash.*

In *White Plains Coal Co.* vs. *Teague,* 173 S. W., 360 (Ky.), we find the following syllabus:

> "A principal authorizing its agent to buy mining rights for cash, and who accepted and held rights purchased by the agent on credit, thereby ratified the agent's acts and was bound to pay for the property, since it could [not] adopt only so much of the agent's acts as were beneficial." (Insert is ours.)

When Steer ratified the Mason & Owen purchase by claiming the stock he took it as he found it subject to a lien for its purchase price and in pledge with a mass of other securities for an indebtedness of about $300,000.00. Logan & Bryan advanced to Mason & Owen the monies with which the 100 shares of Midvale were purchased, to-wit: $4,775.00, thus increasing the loan charged against the mass of pledged securities and thus placing an additional burden on the assets to which the creditors of Mason & Owen could look and we claim that Steer, and not the other customers, should pay the $4,775.00.

## III.

### STEER'S STOCK SHOULD BE HELD LIABLE TO THE EXTENT THAT ITS PURCHASE INCREASED THE LOGAN & BRYAN LOAN.

Steer's claim is that, notwithstanding the fact that the purchase of his stock in the market by Logan & Bryan increased the indebtedness against the securities of the other customers, he should receive *his* stock freed of the

lien of $300,000.00 and that the purchase price of his stock, viz., $4,775.00, *should be charged against the stocks belonging to the other customers of Mason & Owen,* thus increasing the burden on those other stocks for his benefit.

We say that having elected to *ratify* the marginal purchase of the 100 shares of Midvale he must take the stock as he finds it, *i. e.,* subject to the lien of the pledge, particularly as the indebtedness against the pledged securities was actually increased by the purchase of the 100 shares of Midvale.

That is to say: Steer now asks to withdraw the stock but to leave the indebtedness *caused by its purchase,* in other words, wishes to claim the benefits and *reject the burdens* of the contract of purchase. Only *one* purchase of Midvale stock was made (a marginal purchase) and that was the *only* purchase that could be ratified or adopted.

Steer claims the right to treat the purchase as having been made for cash and the stock delivered to Mason & Owen fully paid for and clear of liens. The trouble with that contention is that no purchase of *that* character was made, and he had no opportunity of ratifying *that* kind of a purchase. He had the election to demand the return of his money or to ratify a *marginal* purchase; he chose the latter and must take the stock as he finds it.

Any other disposition of Steer's claim would permit him to add $4,775.00 to the burden on the other customer's stocks and then to require such *other* stocks to discharge the increased indebtedness incurred for *his* benefit.

## A HYPOTHETICAL CASE.

The situation may be simplified as follows: Instead of there being a large number of creditors involved let us suppose there were but two, A and B.

A buys $10,000 worth of stock through Mason & Owen, the order being executed by Logan & Bryan, he paying $4,000 to Mason & Owen which is duly remitted to Logan & Bryan who keep possession of A's stock as security for the unpaid balance of $6,000, A's equity being $4,000.00.

B then orders $4,000 worth of stock and pays Mason & Owen in full therefor. Mason & Owen purchase B's stock on margin through Logan & Bryan who advance the $4,000 as a loan to Mason & Owen and hold both A's and B's stock as security for the entire indebtedness of $10,000. Suppose that B's agents, Mason & Owen misappropriate B's $4,000 and then go into bankruptcy.

A and B then seek to reclaim their stocks from Logan & Bryan. A is willing to pay the balance of the purchase price of his stock, $6,000, and receive his stock, but B insists, because he has paid for his stock in full to his agents who failed to apply it to the purchase of his stock as they should have done, that Logan & Bryan should collect the $10,000 due them by selling A's stock for $10,000, paying off their lien in full, and handing B's stock to him as fully paid for, thus wiping out A's equity of $4,000 to make good the loss caused to B by the malfeasance of his own agents.

Upon what principle of law can it be held that A's equity of $4,000 in his stock should be appropriated to make good the losses sustained by B on account of the wrongful acts of *his own chosen agents?* The learned

counsel for appellee has never satisfactorily answered the above question and we maintain that that question is involved in this case and that an answer thereto cannot be avoided.

The trial court held in one of his interlocutory opinions that Steer did not have the right to reclaim the Midvale stock because he failed to trace his money into the stock, and also decided that Steer could not recover the stock until he had paid the full amount for which the stock had been pledged to Logan & Bryan, and followed the ruling of this court in *Spokane County* vs. *First National Bank of Spokane,* 68 Fed., 979 (982), which holds that ownership on the trust fund theory depends upon proof that the claimant's money can be *traced into the property claimed,* and he further held that Steer had *failed to trace his money into the Midvale stock.*

## THERE IS NO PROOF THAT STEER'S MONEY WAS INVESTED IN THE STOCK.

After having decided at first that Steer had failed to trace his money into the Midvale stock the trial court re-considered his conclusion on that point and decided that a presumption existed that the money had been so invested, saying,

> "In the absence of evidence it is to be presumed, of course, that Mason & Owen did the thing required of them, that is, paid this amount of money on account of the purchase price of the Steer stock" etc. (See Judge Bledsoe's opinion, Record, p. 14).

In making the above finding we contend that the learned judge below overlooked the evidence in the case.

The evidence on that point was as follows:

Inquiry was made of Logan & Bryan as to how the Midvale stock was purchased and whether any monies were ever applied to the purchase price thereof. This inquiry was made by a letter from the trustee of the bankrupts to Logan & Bryan, their reply thereto, and two telegrams between the same parties, and it was stipulated by the parties hereto that said letters and telegrams should be received as evidence of the matters therein stated. (Record, 12.)

The letter from Logan & Bryan (per L. V. Sterling) contains the following:

> "Mason & Owen sent us an order on March 20th, 1920, by telegram, to purchase 100 shares of Midvale stock for them. We immediately executed the order on the New York Stock Exchange by purchasing 100 shares of Midvale for Mason & Owen at $47.75 per share, and immediately notified Mason & Owen, by wire, that we had done so. We advanced for Mason & Owen $4,775, the purchase price of said shares, which money we advanced as a loan to Mason & Owen and charged it to their account, together with $15, commission for making such purchase. The net result of the transaction was that the general loan indebtedness then owing by Mason & Owen to us was increased by $4,775, the amount of the purchase price of the 100 shares of Midvale stock, plus our commission, making a total of $4,790.
>
> "At the time we purchased the Midvale stock above referred to, we had no knowledge, and never since then had any knowledge of any kind, that the stock was being purchased for anyone but Mason & Owen.
>
> "Whatever moneys we received from time to time from Mason & Owen, on account of stocks purchased by us for them, were credited to the general account of Mason & Owen with us, that is, were credited on the indebtedness which Mason & Owen owed us."

The telegram from Logan & Bryan was as follows:

> "Mason & Owen did not request us to apply any money to purchase price of Midvale stock.
>
> "All remittances were applied on their general debit balance.
>
> (Signed) LOGAN & BRYAN."

In addition to the above letter and telegram the parties hereto stipulated that Logan & Bryan held the Midvale stock "as security for the payment of all sums Mason & Owen might owe Logan & Bryan upon said date (March 20, 1920) or subsequent to that time", (Record, 3-4), the stipulation further stating that the Midvale stock was pledged to Logan & Bryan to secure Mason & Owen's indebtedness which subsequently amounted to approximately $300,000, (Record, 5).

The above quotations from the record constitute all the evidence there is as to the tracing of Steer's money into the Midvale stock. There is not the slightest evidence to show that any of Steer's money was ever sent to Logan & Bryan. Neither is there any evidence that Mason & Owen ever attempted to apply any money from *any* source to the payment of the Midvale purchase price. In fact the telegram from Logan & Bryan above quoted shows *affirmatively* that *no such request was ever made by Mason & Owen.*

We therefore contend with the utmost confidence that Steer has *wholly failed to trace his money into the stock in question* and has wholly failed to bring himself within the doctrine of *Spokane County* vs. *First National Bank of Spokane,* 68 Fed., 979 (982).

## THE TRIAL COURT ERRED IN HOLDING THAT THE MIDVALE STOCK WAS NOT HYPOTHECATED.

The trial court also apparently held that there was no hypothecation of the Midvale stock because there was "no showing of any hypothecation of this particular stock for any *particular* sum." (Record, 15). The above references to the record show that the Midvale stock was pledged for $300,000 along with the stocks of other customers of the value of $400,000 (Record, 5).

The record also shows that said $300,000 was paid out of the sale of said *other* stocks, (Record, 6), thereby releasing the Midvale stock, and Steer claims that the monies realized from the sale of the stocks of the other customers should be used to release his stock and that the *other* customers should bear *all* the losses caused by the bankruptcy of Steer's brokers, notwithstanding the fact that the purchase of the Midvale stock was responsible for increasing the burden of the Logan & Bryan loan by $4,775.00.

## THE RIGHTS OF MARGIN TRADERS ARE NOT INFERIOR TO STEER'S RIGHTS.

It appears from the record (page 7) that the securities held in pledge by Logan & Bryan consisted partly of stocks owned by so-called margin traders and partly of stocks whose owners had paid their full purchase price to Mason & Owen, Steer's stock being of the latter class, and Steer claims that he had the right to require Logan & Bryan to collect their loans out of the margin stock before having recourse to the Midvale stock.

Our first answer to said contention is that the Midvale stock was purchased by Mason & Owen as a *mar-*

*ginal* purchase, no money at all having been paid thereon, (see Logan & Bryan letter and telegram, *supra*) and was *strictly margin* stock the same as the other stocks held under the Logan & Bryan pledge.

The second answer is that there is no distinction between margin stock and so-called "fully paid" stock because the title to margin stock is in the purchasers thereof, subject only to a lien against same for the unpaid purchase money.

*Richardson* vs. *Shaw,* 209 U. S., 365 (380).

In the Wilson case (252 Fed., 631) the court said:

> "Lastly, in this connection, it is urged that margin customers are on a different basis from those who have paid for their securities outright. *There is no logical ground for this distinction.* The margin customer is the owner of the securities which the broker is carrying for him, and they become his absolutely the moment he pays any amount outstanding against him. The broker, it is true, may not hypothecate the securities of the outright owner, and may hypothecate those of the margin customer." (Page 649.) (Our italics.)

The court in the Wilson case did not hold that a broker could hypothecate margin stock without the consent of the owner. What was said on that point in the above excerpt must be read in connection with the facts in that case which were that the margin traders there involved had *consented to the pledge of their stock.* (See copy of re-pledge agreement on page 643 of opinion.)

In fact, it is a criminal offense in New York for a broker to re-pledge margin stock for more than the unpaid purchase price unless the owner authorizes the broker in writing so to do. (See copy of criminal statute at bottom of page 643 of the opinion in the Wilson case.)

## THE FACT THAT A STOCK SURVIVED THE PLEDGEE'S SALE DOES NOT CREATE SPECIAL RIGHTS.

It may be contended that the fact that the Midvale stock fortuitously survived the sale by Logan & Bryan of portions of the pledged stock gives it special rights. The decisions are against that contention.

*Re Wilson,* 252 Fed., 631 (639-40);
*Whitlock* vs. *Seaboard Bank,* 60 N. Y. Supp., 611 (613).

## THE LOGAN & BRYAN DEBT WAS A COMMON PERIL.

The owners of all the securities in the pledge were faced with a common danger, viz., an enforceable debt of $300,000. All were interested alike in getting rid of the peril. Some stocks had to be sacrificed to save the rest, just as some goods are thrown from a ship in a storm in order to save the balance of the cargo, but the salvaged part has to stand its share of the loss. This same equitable rule applies to the Steer stock which was saved by the sacrifice of the other stocks and clearly Steer should contribute his part of the loss and the other owners are subrogated to the rights of Logan & Bryan against Steer's stock. It was so held by Judge Bledsoe in one of his opinions. He filed three opinions, each one apparently differing from the others. We have filed with the papers in the case certified copies of the first two opinions which Your Honors may desire to refer to.

## APPELLEE'S CONTENTION.

The appellee's contention in the lower court was that he should recover because, (a) there was no other cus-

tomer claiming any Midvale stock, and (b) because he had given to his agents, Mason & Owen, the necessary money to enable them to purchase and pay for the stock. He contends that he should not be held responsible for the malfeasance of his agents in failing to purchase, pay for and acquire possession of the stock ordered by him, but contends that such loss should be charged against the *other customers of Mason & Owen* because they were margin traders.

We trust that the argument heretofore made in this brief answers the above contentions and all that remains now is to consider briefly the authorities cited by appellee in the court below.

## ANALYSIS OF APPELLEE'S AUTHORITIES.

We do not know whether appellee will cite the same decisions here that he relied upon below so will not lengthen this brief, already longer than intended, by commenting thereon, but have set forth a careful analysis of said authorities in an Addenda to this brief, to which attention is respectfully asked in the event such decisions are cited in appellee's brief.

## TESTIMONY OF MASON.

Portions of Mason's testimony were printed in the Record at appellee's request. (Record, 17-21). The testimony seems to be immaterial and we will not refer to same except to raise the objection made in the court below (Record, 20-21), that same was hearsay and incompetent. What Mason may have said, in court or out of court, regarding Steer's stock was undoubted hearsay. Neither are his statements admissible as admis-

sions because his admissions made *after* his estate passed to the trustee in bankruptcy cannot bind the trustee. It may be added that Steer, not being a creditor of the bankrupts, was not a party to the creditors' meeting before the Referee and the testimony of Mason could not have been used against *him* and therefore cannot be used *for* him.

Nor was his testimony signed by him as required by General Order in Bankruptcy XXII.

## NET RESULT OF THE DECISION OF THE LOWER COURT.

In conclusion we wish to point out that the real meaning of the decision of the lower court is that Steer is not to be held responsible for the acts of *his own chosen agents,* but can shift that responsibility to the shoulders of third parties who had nothing whatever to do with the selection of Steer's agents, and who had nothing whatever to do with the malfeasance of said agents, and we are bold enough to inquire, in the event Steer can shift his losses onto the shoulders of the other customers of Mason & Owen, whether such other customers cannot shift *their* losses onto Steer's shoulders. *Surely the rule ought to work both ways.*

We ask that the judgment of the lower court be reversed with directions to require Steer to pay to the trustee $4,775.00 as a condition of the delivery of the stock and that his reclamation petition be dismissed on the merits unless such payment be made within a time to be fixed by the court.

Respectfully submitted,

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# ADDENDA.

## ANALYSIS OF AUTHORITIES CITED BY APPELLEE IN THE LOWER COURT.

*Re McIntyre & Co.*, 181 Fed., 955 (Pippey's case). Pippey's transactions with McIntyre & Co. (the brokers) were closed on April 9, 1908, leaving McIntyre holding 18 shares of Pullman for Pippey. McIntyre wrongfully hypothecated these shares on April 23, 1908, and failed on April 24, 1908. The court held that the pledge of Pippey's stock was "a larceny of the stock", (p. 958). The *identical* certificate given by Pippey to McIntyre & Co. was found in the pledgee's possession free and clear of any lien and the court held that Pippey was entitled to the property *stolen* from him. The court said certain other decisions do not control "when property stolen from its real owner is found unsold in the possession of the thief" (p. 959). This was on the principle that stolen property may be recaptured wherever found.

*Gorman* vs. *Littlefield,* 229 U. S., 19, has no bearing on the case at bar. In that case the claimant had ordered and paid for 250 shares of copper stock. The bankrupt broker bought the shares, as directed, together with 100 additional shares of the same copper stock. The 350 shares were duly delivered to the broker subject to Gorman's order and were found *in the broker's possession* at the time of his failure (p. 22). *The stocks had not been pledged for the broker's debts* (as in the Steer case) and the court held that the trustee should deliver to Gorman his 250 shares which is quite different from taking the shares from a *bona fide* pledgee.

In *Thomas* vs. *Taggart,* 209 U. S., 385, 83 shares of steel stock had been left with the broker as security for losses, if any should occur. None occurred. The steel stock survived the sale by the bank to which it had been pledged.

It was not shown, as in the case at bar, that the stock had been purchased by the broker on margin with monies borrowed on the stocks of other customers, nor that the customer left his stock in the pledge for eight months, during which time the loan increased, *nor was it shown that the loan against the pledged stock was increased by the full purchase price of the reclaimed stock* as was done in the Steer case.

In *Richardson* vs. *Shaw,* 209 U. S. 365, it appeared that the claimants were margin traders. The court held that as such they were the *legal owners of the stocks* which the broker was carrying for them on margin; that being owners the relation of debtor and creditor did not exist between them and their broker, (the bankrupt) and that therefore, the broker had the right to continue to transact his business *in the ordinary way* until bankruptcy proceedings should be begun, and to deliver stocks to their owners, as usual, on payment of what the customer still owed, and the decision in the case was simply that *the court would not disturb the voluntary arrangement made between the broker and his customers.* That is as far as the decision went, and of course, does not apply to the case at bar where the broker refused to deliver the stock to his customer after demand therefor, he having lost control of it under a huge pledge. Steer in this case had made a futile demand for his stock. (Record, 5). We hope Your Honor will find time to

give the Richardson case a careful reading, as we believe it will bear our construction of it.

In *In re Bolling*, 147 Fed., 786, the question was whether, as between a margin trader and the *general creditors* of the bankrupt, the proceeds of certain stock which had been purchased for the margin trader should be paid to the owner of the stock, or be applied to *general creditors.* The contest regarding these proceeds was between the *general creditors,* on the one hand, and the owner of the stock which produced the fund, on the other hand, and the court *decided in favor of the margin trader.* We believe the decision was correct.

In *Royea's Estate,* 143 Fed., 182, the referee ordered $120.00 to be paid to the claimant out of the funds found in the bankrupt's bank account. The question was whether the $120 had been sufficiently traced and the court properly held that it had been. Also, the contest in the Royea case was between the claimant and the *general creditors,* as stated at the bottom of page 182 of the opinion, which is not the case here.